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THE INJUNCTION IN STRIKES, BOYCOTTS AND PICKETING.—Considerable confusion exists among the authorities as to the legality of strikes, boycotts and picketing. The rights of organized labor differ widely in the different States, and it is impossible to reconcile the decisions upon any principle of law. The confusion which exists, however, is due not only to real differences as to the law, but also in no small measure to the use of common terms in varying senses.

In many ways the labor unions have succeeded in bettering the condition of the laborer; and in so far as their ultimate intentions and the means employed in accomplishing them are legal they are entitled to the protection of the law; but, however justifiable or laudable may be the ultimate objects of organized labor, unlawful means cannot be used.

The right of workmen to form unions, and to enlarge their membership by inviting other workmen to join the union, is freely conceded by the courts, provided the objects of the union

be proper and legitimate and this right be exercised with reasonable regard for the conflicting rights of others.[1] The Thirteenth Amendment has forbidden slavery and involuntary servitude, and the specific enforcement of labor contracts is slavery. Even when under a definite time contract, workmen cannot be compelled to work when they wish to quit. Consequently, quitting work cannot be directly prevented by an injunction.[2] Where, however, the contract for personal services amounts to an undertaking, express or implied, not to perform them for any one else, and the services are unique, equity will enjoin the party from engaging in such competitive service.[3] But in the great majority of labor controversies only unskilled laborers are participants. Hence, to all practical intents and purposes, quitting work by unionmen is lawful.

But in all strikes something more than quitting work is involved. There is the antecedent agreement by the workmen to quit their employment, demands are made upon the employer, and a threat to strike unless he yield to their demands. It is the conspiracy, of which quitting work is but a part, which constitutes, in the legal sense, a strike. The strike in this sense is not always legal.

It is generally conceded by the authorities that workmen may quit work in a body, or strike, in order to maintain wages, secure advancement in wages, procure shorter hours of employment, or otherwise better the working conditions. An agreement by a combination of individuals to strike, or quit work, for the purpose of advancing their own interests, or the interests of the union of which they are members, and not having for its primary object the purpose of injuring others in their business or employment, is lawful, and the courts uniformly refuse to interfere by granting an injunction to prevent such a strike, even though it results incidentally in injury to others.[4] But where the purpose of the strikers is primarily to injure the employer, non-union men, or members of a rival union, the strike is considered illegal in many jurisdictions. Thus strikes, or threats of strikes, to gain a closed shop where only members of the trade union are em-

[1] Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418; Brennan *v.* United Hatters, 73 N. J. L. 729, 65 Atl. 165.

[2] Arthur *v.* Oakes, 63 Fed. 310.

[3] Lumley *v.* Wagner, 1 De G., M. & G. 604.

[4] Karges Furniture Co. *v.* Amalgamated Woodworkers, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788; Minasian *v.* Osborne, 210 Mass. 250, 96 N. E. 1036; Traux *v.* Bisbee Cooks' & Waiters' Union, 19 Ariz. 379, 171 Pac. 121; Railroad Co. *v.* Bowns, 58 N. Y. 573; Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 802; Hopkins *v.* Oxley Stave Co., 83 Fed. 912; National Protective Association *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; Parkinson *v.* Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165; Hall *v.* Johnson, 87 Ore. 21, 169 Pac. 515; Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319.

ployed,[5] to procure the removal of an objectionable foreman,[6] sympathetic strikes by employees who have no grievance against their employer, but who quit work in order to assist strikers in other trades in enforcing their demands,[7] and strikes against material manufactured or constructed by non-union workmen [8] have been condemned in many jurisdictions.

In some jurisdictions [9] strikes to secure a closed shop are upheld upon the ground that such action is not unlawful interference with the rights of the non-union employees, the purpose of the strike not being to injure the non-union employees, but to protect the union, and so being different from a boycott, the primary object of which is to inflict injury upon another. The courts holding strikes against non-union material illegal consider the strike as directed against the purchaser of the material by unaffected third parties. Other courts, viewing the facts differently, recognize the unity of interest throughout the union, and that, in refusing to work on non-union material, the union is only refusing to aid in destroying itself.[10] Whether the purpose of a strike is justifiable is a question of law, to be decided by the court, and not by the strikers; and their good faith will not make it a legal strike, unless it is for a legal purpose, though to be justifiable in any case the strikers must act in good faith.

The means employed by the strikers, viz., the boycott and picketing, to render the strike effective are questions of great difficulty and have been before the courts in a great number of cases, and the courts have arrived at opposite conclusions, which are irreconcilable. The term "boycott" is used in varying senses. An

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[5] Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229; Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Lucke *v.* Clothing Cutters' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; Erdman *v.* Mitchell, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 788; Conners *v.* Connolly, 86 Conn. 641, 86 Atl. 600; State *v.* Dyer, 67 Vt. 690, 32 Atl. 814.

[6] De Minico *v.* Craig, 207 Mass. 593, 94 N. E. 317; *contra*, Clemitt *v.* Watson, 14 Ind. App. 38, 42 N. E. 367.

[7] Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753, 116 Am. St. Rep. 272, 6 L. R. A. (N. S.) 1067; Lohse Patent Door Co. *v.* Fuelle, 215 Mo. 421, 114 S. W. 997, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492; Shine *v.* Fox Bros., 156 Fed. 357; Irving *v.* Council of Carpenters, 180 Fed. 896.

[8] Burnham *v.* Dowd, 217 Mass. 351, 104 N. E. 841, 51 L. R. A. (N. S.) 778; Purvis *v.* United Brotherhood, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275; Booth *v.* Burgess, 72 N. J. Eq. 181, 65 Atl. 226.

[9] Kemp *v.* Division No. 241, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D 347; National Protective Ass'n *v.* Cumming, *supra;* Roddy *v.* United Mine Workers, 41 Okla. 621, 139 Pac. 126, L. R. A. 1915D 789; Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230.

[10] Bossert *v.* Dhuy, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D 661; Cohn & Roth Electric Co. *v.* Bricklayers, 92 Conn. 161, 101 Atl. 659, 6 A. L. R. 887; Gill Engraving Co. *v.* Doerr, 214 Fed. 111; Grant Construction Co. *v.* St. Paul Building Trades, 136 Minn. 167, 161 N. W. 520, 1055; Pierce *v.* Stablemen's Union, 156 Cal. 70, 103 Pac. 324.

organized union of employees may, by concerted action, cease dealing with a former employer with whom it has a grievance,[11] and such action is known as the primary boycott. One cannot be compelled to deal with another. When the strikers bring coercive pressure, actual or prospective, upon customers of the employer with whom the strikers have a grievance, in order to cause such customers to withhold or withdraw their patronage from the employer through fear of loss or damage to themselves should they deal with him, we have a case of what is known as the secondary boycott. This distinction between a primary and a secondary boycott is deemed essential by the Supreme Court in the recent case of *Duplex Printing Co.* v. *Deering,* 41 Sup. Ct. 172, which decided that the section of the Clayton Act of 1914 (Comp. Stat. '16, § 1243d) prohibiting the use of injunctions in labor boycotts is merely declaratory of the common law, and that an injunction still lies when illegal methods are practiced by the strikers. Few employers of labor sell their products directly to the consumers, and, therefore, in actual practice, there are but few primary boycotts, since to boycott a manufacturer pressure must be brought to bear upon the dealers who handle his products. Consequently, many courts use the term "boycott" as embracing only secondary boycotts.

The majority of the courts in this country vigorously deny the legality of the secondary boycott, and hold that it is unlawful, in an effort to compel the employer to yield even a legitimate benefit to the strikers, for the strikers to demand that a third party withdraw his patronage from the employer under the penalty of losing the strikers' services or patronage to which he has no contract right.[12] A few courts, however, recognizing the right of the employees to withdraw their patronage from the employer, take the view that such employees may, by fair oral or written persuasion, induce others interested in, or sympathetic with, their cause to withdraw their patronage from the employer, and may use the moral coercion of threatening a like boycott against them if they refuse to do so.[13] Under this view, therefore, a secondary boycott may be carried out by legal means and methods, and

[11] Wilson *v.* Hey, 232 Ill. 389, 83 N. E. 928; Mills *v.* U. S. Printing Co., 91 N. Y. Supp. 185.

[12] Hopkins *v.* Oxley Stave Co., *supra;* Beck *v.* Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172; Jackson *v.* Standfield, 137 Ind. 592, 36 N. E. 345, 23 L. R. A. 588; Crump *v.* Commonwealth, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; George Jonas Glass Co. *v.* Glass Bottle Blowers, 72 N. J. Eq. 653, 66 Atl. 953; State *v.* Glidden, 55 Conn. 46, 8 Atl. 890; My Maryland Lodge *v.* Adt, 100 Md. 238, 59 Atl. 721; Jensen *v.* Cooks' & Waiters' Union, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302.

[13] Parkinson *v.* Building Trades Council, *supra;* Pierce *v.* Stablemen's Union, *supra;* Lindsay *v.* Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722; Traux *v.* Bisbee Cooks' & Waiters' Union, *supra.*

thus be merely a legitimate combination by a number of men to accomplish, within the law, a legal result. But any act which passes beyond moral suasion, and plays by intimidation on physical fears, is unlawful, and will be restrained by an injunction; and the courts are quick to perceive the possibility of force in any action on the part of the strikers. The crux of the question in every case under this view turns upon the means employed by the strikers. Nor do these authorities recognize the distinction between the so-called primary and secondary boycott, since they hold that the unions have the right to withdraw their patronage from a third person who deals with their employer, and also the right to notify such third person that they will withdraw their patronage if he continue to deal with their employer.

Strikes cannot be effective when the employer is able to secure a sufficient number of new employees. Hence, the strikers often endeavor to prevent the employer from getting new employees by establishing a line of pickets around the employer's premises. All the authorities agree that picketing, accompanied by threats, force and intimidation is an unlawful interference with the rights both of the employer and the employed, even though the ultimate object of the strike be legal. An employer has a right to engage all persons who are willing to work for him at such prices as may be mutually agreed upon; and persons employed or seeking employment have a corresponding right to enter or remain in the employment of any person willing to employ them.[14]

The question of peaceable picketing has frequently been before the courts. Many courts have held that there can be no such thing as peaceable picketing,[15] while others hold that peaceable picketing is not illegal.[16] The cases that hold picketing to be illegal *per se,* and that there can be no such thing as peaceable picketing deal with a state of facts wherein the purpose of the picketing was to watch and influence the employees working, or persons seeking employment, and to cause those working to quit work, or to prevent those seeking employment from the unfair

[14] Willcut & Sons Co. *v.* Bricklayers' Union, 200 Mass. 110, 85 N. E. 897; Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206; State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621.

[15] Pierce *v.* Stablemen's Union *supra;* Barnes & Co. *v.* Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018, 13 Ann. Cas. 54; St. Germain *v.* Bakery, etc., Union, 97 Wash. 282, 116 Pac. 665, L. R. A. 1917F 824; Hall *v.* Johnson, *supra;* In re Langell, 178 Mich. 305, 144 N. W. 841, 50 L. R. A. (N. S.) 412; Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106; Otis Steel Co. *v.* Moulders, 110 Fed. 698; Atchison, etc., R. Co. *v.* Gee, 139 Fed. 582.

[16] United States *v.* Kane, 23 Fed. 748; Kolley *v.* Robinson, 187 Fed. 415; Everett Waddey Co. *v.* Richmond Typographical Union, 105 Va. 188, 53 S. E. 272; Karges Furniture Co. *v.* Amalgamated Woodworkers, *supra;* Searle Mfg. Co. *v.* Terry, 106 N. Y. Supp. 438; Jones *v.* Van Winkle Gin & Machine Works, 131 Ga. 336, 62 S. E. 236; Cumberland Glass Mfg. Co. *v.* Glass Blowers, 59 N. J. Eq. 49, 46 Atl. 208.

employer from obtaining it. It is the manner in which the picketing is conducted, in those jurisdictions recognizing the legality of peaceable picketing, which determines its legality in each particular case. There are few standards which the courts have employed in determining whether the picketing has in fact been peaceable or intimidating. Thus, several courts have held that an injunction will be granted an employer where numerous third parties interfere with his employees against the latter's consent, and endeavor by unlawful means to induce them to quit.[17] A Massachusetts case goes so far as to hold that the presence of two pickets at a factory entrance is intimidating, and may be relieved by an injunction.[18]

But, where the picketing is intended solely to affect prospective patrons and customers by causing them to trade elsewhere, by making it known to the general public that a strike is on against the employer for the reason that he is unfair to organized labor, and the conduct of the pickets is peaceable, a few courts hold such action on the part of the strikers to be permissible, and an injunction will not lie to prevent such action.[19]

P. M. P.

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THE RULE OF TRIENNIAL COHABITATION.—The doctrine of triennial cohabitation, that is, that if there has been no sexual intercourse between married parties after an ostensible cohabitation as husband and wife for three years, the husband will be presumed impotent, and the burden will be upon him to overcome this presumption, is well settled in England.[1]

In the case of *The Countess of Essex*,[2] decided in the year 1613, the law of triennial cohabitation was declared by the King's Delegates as follows:

> "That *impotentia coeundi in viro* whatsoever, whether by natural defect, or accidental means, whether absolute towards all, or respective to his wife only, if it precede matrimony, and be perpetual (as by law is presumed, when after three years trial, after the man is of the age of eighteen, there has been *nil ad copulam*, and the marriage not consummated) is a just cause of divorce *a vinculo matrimonii*."

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[17] Jersey Printing Co. *v.* Cassidy, *supra;* Goldfield Mines Co. *v.* Miners' Union, 159 Fed. 500; O'Neil *v.* Behanna, 182 Pa. 236, 37 Atl. 843; Jones *v.* Van Winkle Gin & Machine Works, *supra.*

[18] Velegahn *v.* Guntner, *supra.*

[19] Traux *v.* Bisbee Cooks' & Waiters' Union, *supra;* Webb *v.* Cooks' & Waiters' Union (Tex.), 205 S. W. 465; Justin Seubert, Inc. *v.* Reiff, 164 N. Y. Supp. 522.

[1] Lewis *v.* Hayward, 35 L. J. (N. S.) P. & D. 105; Welde *v.* Welde, 2 Lee Ecc. 578; C— *v.* C—, 29 L. J. (N. S.) 81; S— *v.* A—, 3 Prob. Div. 72; F— *v.* P—, 75 L. T. 192; S— *v.* E—, 3 Swab. & Tr. 240; G— *v.* S—, 1 Spinks Ecc. 389; A— *v.* B—, 1 Spinks Ecc. 12.

[2] 2 How. St. Tr. 786.